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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re H.H. et al., Persons Coming Under the
Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

RUSSELL H. et al.,

Defendants and Appellants.

D053455

(Super. Ct. No. NJ13174B-C)

APPEAL from judgments of the Superior Court of San Diego County, Harry Elias,
Judge. Affirmed.

Russell H. and L.S. (the parents) appeal judgments terminating their parental
rights to two of their daughters, H.H. and T.H. (the children), and denials of their Welfare
and Institutions Code¹ section 388 petitions. They contend the court erred by denying

¹ Statutory references are to the Welfare and Institutions Code.

their section 388 petitions and by finding the children to be adoptable. They also assert the court erred by not finding the sibling relationship exception to termination of parental rights and adoption applied in the case. Additionally, L.S. asserts the court erred by not finding the beneficial parent-child relationship exception to termination of her parental rights applied in this case, and by designating the children's caretakers as their prospective adoptive parents. Each parent joins in the arguments presented by the other parent. We affirm the judgments.

FACTUAL AND PROCEDURAL BACKGROUND

In July 2004 T.H. was born exposed to methamphetamine, and the parents entered into a voluntary contract with the San Diego County Health and Human Services Agency (the Agency). However, the parents did not cooperate with voluntary services and one year later, on July 15, 2005, the Agency petitioned under section 300 on behalf of one-year-old T.H., two-year-old H.H. and their four-year-old sister, Jordan H., on the basis of the parents' methamphetamine use and the fact the family was living in filth in a car containing drug paraphernalia. Police arrested L.S. for possession of stolen property and possession of drug paraphernalia and Russell for possession of stolen property, and took the children into protective custody.² The court ordered the children detained.

The parents minimized their methamphetamine use. They denied domestic violence, but Jordan said they fought and Russell slaps L.S.

² The court later dismissed an additional allegation the parents were incarcerated and unable to arrange care for the children.

The court found the allegations of the petitions true, declared the children dependents and placed them in foster care, and ordered the parents to comply with their services plans and to enroll in the Substance Abuse Recovery Management System program.

Although the parents initially did not comply with their case plans, they subsequently began working on their services, and at the 12-month hearing on October 24, 2006, the court placed the children with them. In June 2007 L.S. gave birth to another daughter, K.H., and the parents entered into a voluntary contract with the Agency concerning K.H.³

By July 2007 the Agency had lost contact with the family. The social worker learned Russell had been arrested in May for possessing and being under the influence of a controlled substance and for selling drug paraphernalia. On October 3 the children were again taken into protective custody. The Agency filed supplemental petitions on their behalf under section 387, alleging Russell was incarcerated, the parents had not completed court-ordered treatment, and L.S. was homeless.

On November 29, 2007, the court found the allegations of the supplemental petitions true, continued the children as dependents and terminated reunification services. The children were placed together in a foster home, where there were reports they had behavioral problems and were sexually acting out.

³ Neither K.H. nor Jordan is a subject of this appeal.

The social worker recommended parental rights be terminated with adoption as the permanent plan. The children were developing well and, although both had diagnoses of adjustment disorder with mixed anxiety and depression, therapy had helped to reduce their anxiety and impulsive behaviors, and their sexualized behavior was ceasing. The social worker reported L.S. visited the children, but had difficulty redirecting dangerous behavior and rarely engaged them in play. Russell did not visit because he was in custody. The Agency reported there were 20 homes that would accept placement of two minors with the children's characteristics. In March 2008 the children were placed with a family who had completed an adoptive home study and were committed to providing a permanent home for them. The children adjusted well to this placement and began calling their caregivers "Mommy" and "Daddy." The children had significant relationships with their sister, Jordan, who was in the process of reunifying with her biological father. The children recognized K.H. as their sister, but were not distressed when leaving her at the end of visits and did not ask about her between visits.

In subsequent reports, the Agency reported Russell had been released from custody and was participating in parenting classes and out-patient drug abuse treatment and testing. L.S. was also participating in services and was visiting the children.

On April 14, 2008, L.S. petitioned under section 388, requesting the court place the children in her care and order family maintenance services. She claimed this was in their best interests because they were bonded to her and to Jordan and K.H. L.S. was attending a parenting program and participating in an out-patient drug abuse treatment program. On June 9 Russell filed a section 388 petition, requesting the children be

returned to his care. He said he was no longer in custody and had reengaged in services. He claimed returning the children to his custody would benefit them because it would ensure continued contact between family members. On July 21 the court granted both parents' requests to amend the section 388 petitions to include requests for relative placement.

At the combined section 388 and section 366.26 hearings on July 21, 2008, L.S. testified she was attending drug abuse treatment, was employed and had plans for the children's care were they placed with her. She said she no longer had contact with Russell. She testified that at visits the children greeted her with hugs and kisses, asked about seeing Jordan and K.H. and, until recently, had severe reactions when visits ended. She said she was addressing her issues of depression and codependency in therapy.

L.S.'s therapist testified L.S. was living independently and was employed. She said L.S. had made substantial progress, her depression and the possibility of her relapsing had lessened, and she had very good bonds with the children.

The children's maternal grandfather (the grandfather) testified he was interested in caring for the children, but needed time to prepare his home for them.

Russell testified that after his release from custody in May 2008, he had enrolled in a substance abuse treatment program and was attending a parenting class. Since his release, he had had two visits with the children.

The social worker testified the children's problem behaviors had lessened while they were in their current placement. He said the children were thriving in their caregivers' home and the caregivers were committed to adopting them. He stated their

abandonment and anxiety issues were exacerbated by visits with the parents. He also stated L.S.'s depression and codependency issues had not been resolved sufficiently for her to be able to care adequately for herself, and he was concerned about her ability to be a parent for the children. He testified that Russell had not visited or contacted the children's caregivers for months, had severely relapsed after previous treatment, and had no place for the children to live.

The court denied the parents' section 388 petitions, finding they were in the early stages of changing, and it would not be in the children's best interests to return to either parent or to be placed with the grandfather. The court found both children were generally and specifically adoptable and none of the statutory exceptions to termination of parental rights and adoption applied in the case. It terminated parental rights and designated the children's caregivers as their prospective adoptive parents.

DISCUSSION

I. The Section 388 Petitions

The parents each contend the court abused its discretion by denying their section 388 petitions.

Section 388 provides in part:

"(a) Any parent or other person having an interest in a child who is a dependent child of the juvenile court . . . may, upon grounds of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a dependent child of the juvenile court . . . for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court. . . . [¶] . . . [¶]

"(d) If it appears that the best interests of the child may be promoted by the proposed change of order . . . the court shall order that a hearing be held"

To gain the relief sought in a section 388 petition, the petitioner must show both a change of circumstances or new evidence and that the change sought is in the child's best interests. (§ 388; Cal. Rules of Court, rule 5.570(e); *In re Michael B.* (1992) 8 Cal.App.4th 1698, 1703.) A petition is liberally construed in favor of its sufficiency. (*In re Angel B.* (2002) 97 Cal.App.4th 454, 461.) The petitioner bears the burden of proof, however, to make both showings. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.)

"The [section 388] petition is addressed to the sound discretion of the juvenile court and its decision will not be disturbed on appeal in the absence of a clear abuse of discretion." (*In re Jasmon O.* (1994) 8 Cal.4th 398, 415.) A reviewing court will not disturb a court's discretionary ruling in a dependency proceeding " " "unless the trial court has exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination [citations]." " " (*In re Stephanie M., supra*, 7 Cal.4th at p. 318.)

A. L.S.'s Petition

L.S. contends the court abused its discretion by denying her petition. She claims she was fully engaged in services, including a parenting class and substance abuse treatment, and she was described as an ideal client. She argues her therapist attested to the great improvements she has made in her life during the past months. Alternatively, she claims she showed the court should place the children with their grandfather because he was willing and able to care for them.

As the court found, L.S. showed changing, but not changed, circumstances. She had completed a drug abuse treatment program, but had not yet started an aftercare

program. Her drug use was longstanding, and she had relapsed earlier after completing a treatment program. Her drug use and depression continued to be a problem for her throughout the dependencies of the children. Her therapist stated L.S.'s problems with drug abuse and codependency had improved. However, L.S. and her therapist had had only 12 therapy sessions. L.S. admitted her depression affected her ability to be an effective parent and reports of her visits with the children showed that despite completing parenting classes, she remained unable to redirect the children's problem behavior. She was still in the early stages of dealing with her severe drug addiction, depression and codependency issues. The court's finding was not an abuse of discretion.

L.S. also has not shown error by the court's finding it would not be in the children's best interests to be placed with her. As the social worker testified, the evidence did not show her depression and codependency issues had been fully resolved so that she could provide adequate care for the children. Moreover, the children were beginning to form attachments with their caregivers, and the social worker stressed the importance of stability and permanence to the children after the years of insecurity they had experienced.

L.S. also has not shown error by the court not placing the children with the grandfather. The grandfather testified that before the time of the hearing, he had not seen the children for one year and before that time had not seen them for several months. The report from the time of the first detention states the grandfather said he regretted being unable to care for the children. According to the second detention report, he said he could possibly take Jordon only, but needed to consider this. At the hearing he said he

did not remember saying he was unable to take the children but, in any event, he did not contact the Agency during the year before the hearing to say he was available for placement or to request visitation with his grandchildren. He had not been in contact with the current foster parents. His claim he did not know he could contact them is belied by the fact that he previously communicated with their former foster parent. The grandfather had not requested placement earlier, and at the time of the hearing the children were in a stable placement with caregivers who wanted to adopt them. The court's decision not to place the children with him was not an abuse of discretion.

B. Russell's Petition

Russell asserts the court abused its discretion by denying his section 388 petition because the evidence showed he had remedied his problems and was able to care for the children. He argues that at the time of the hearing, he had been released from prison and was participating in a comprehensive drug abuse treatment program, was scheduled to begin counseling and had successful visits with the children. He claims the children were bonded to him and notes they had lived with their prospective adoptive parents for only four months at the time of the hearing.

Russell has not shown an abuse of the court's discretion. He, like L.S., showed circumstances in the process of changing, not changed circumstances as required by the statute. Russell had just begun drug abuse treatment after his recent release from custody. He had relapsed after earlier treatment and had not yet shown he could remain drug free for a substantial time. He was arrested in March, July and December 2005 and in May and September 2007, and was in custody from September 2007 until May 2008.

He had not yet shown he could remain law abiding. Also, he had not completed parenting classes and was living in a sober living facility, which did not accept children.

Further, the court did not err by finding it would not serve the children's best interests to place them with Russell. He had not provided consistent care for them in the past because of his frequent incarcerations and their removal from his custody, and he did not show he could provide a safe and stable home for them. Russell has not shown an abuse of the court's discretion.

II. *The Court's Finding the Children Were Likely to be Adopted*

The parents contend the court erred by finding the children were likely to be adopted within a reasonable time. L.S. argues the children were not generally adoptable and had not been in their latest foster home long enough for the court to find they were specifically adoptable. Russell asserts their psychological and behavioral issues would hinder a successful adoption.

Before a court frees a child for adoption it must determine by clear and convincing evidence that the child is likely to be adopted within a reasonable time. (§ 366.26, subd. (c)(1); *In re Jennilee T.* (1992) 3 Cal.App.4th 212, 223.) "In resolving this issue, the court focuses on the *child*--whether his [or her] age, physical condition and emotional state make it difficult to find a person willing to adopt him [or her]." (*In re David H.* (1995) 33 Cal.App.4th 368, 378.) Whether there is a prospective adoptive family is a factor for the court to consider, but is not determinative by itself. (*Ibid.*) The fact that children are with families who want to adopt them supports a finding they are generally adoptable. (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649-1650.) "On appeal, we

review the factual basis for the trial court's finding of adoptability and termination of parental rights for substantial evidence." (*In re Josue G.* (2003) 106 Cal.App.4th 725, 732.) The appellant bears the burden to show that the evidence is insufficient to support the court's findings. (*In re Geoffrey G.* (1979) 98 Cal.App.3d 412, 420.)

Substantial evidence supports the court's findings the children were generally and specifically adoptable. The social worker reported both children were healthy and highly intelligent and had good development. He described them as interactive and playful. In July 2008 he reported there were 20 adoptive homes available to adopt children with their characteristics. The tantrums and sexualized behavior the children displayed after the second time they were removed from the parents' custody had greatly lessened by the time of the hearing and, with the help of their therapist and foster parents, they were learning to handle their fears and anxieties. Although they had been with their foster parents for only four months at the time of hearing, the fact they were with a family who wanted to adopt them further supports the court's finding of adoptability.

III. *The Sibling Relationship Exception to Termination of Parental Rights and Adoption*

The parents contend the court erred by finding the sibling relationship exception to termination of parental rights and adoption did not apply in this case.

Adoption is the permanent plan favored by the Legislature. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 573.) If the court finds by clear and convincing evidence that a child is adoptable, it becomes the parent's burden to show that termination of parental rights would be detrimental to the child because of a specified statutory exception to termination of parental rights and adoption. (*Id.* at p. 574.) In reviewing whether there is

sufficient evidence to support the trial court's finding, the appellate court reviews the evidence most favorably to the court's order, giving the prevailing party the benefit of every reasonable inference and resolving all conflicts in support of the order. (*Id.* at p. 576.)

Under section 366.26, subdivision (c)(1)(B)(v), if the court finds the child will be adopted within a reasonable time, adoption must be ordered " 'unless the court finds a compelling reason for determining that termination [of parental rights] would be detrimental to the child' because '[t]here would be substantial interference with a child's sibling relationship' " (*In re Daniel H.* (2002) 99 Cal.App.4th 804, 811.) The purpose of this exception is to preserve long-standing sibling relationships that serve as "anchors for dependent children whose lives are in turmoil." (*In re Erik P.* (2002) 104 Cal.App.4th 395, 404.) The sibling relationship exception contains "strong language creating a heavy burden for the party opposing adoption." (*In re Daniel H., supra*, at p. 813.) Factors for the court to consider under section 366.26, subdivision (c)(1)(B)(v), include the nature and extent of the sibling relationship, whether the siblings were raised in the same home, whether they share a close bond and whether continued contact is in the child's best interests, as compared to the benefits of adoption. The court considers the best interests of the adoptive child, not the best interests of other siblings. (*In re Daniel H., supra*, at p. 813.)

The court did not err by finding the sibling relationship exception did not apply. It was not possible for the children to live with their older sister, Jordan, because she had moved to Florida to live with her biological father, and he was not available to also care

for the children. Their relationships with their younger sister, K.H., were less significant than their relationships with Jordan because they had lived with K.H. for only a few months when she was an infant and, although they appeared to enjoy seeing her and playing with her, they showed no distress when leaving her at the end of visits. The court did not err by finding the benefits to the children of their sibling relationships did not outweigh the benefit to them from the permanency and stability they would receive in an adoptive home.

IV. The Beneficial Parent-Child Relationship Exception to Termination of Parental Rights and Adoption

L.S. contends the court erred by not finding the beneficial parent-child relationship exception did not apply to prevent termination of her parental rights to the children.

Under section 366.26, subdivision (c)(1)(B)(i), unless the court finds the child will be adopted within a reasonable time, adoption must be ordered unless the parent shows that termination of parental rights would be detrimental in that "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." In *In re Brandon C.* (1999) 71 Cal.App.4th 1530, 1534, the court noted "[c]ourts have required more than just 'frequent and loving contact' to establish the requisite benefit for [the] exception." To establish this exception to termination of parental rights, the parent must show that the relationship he or she enjoys with the child must promote the child's well-being to such a degree that it outweighs the benefit the child would gain from being adopted into a stable home. (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.)

L.S. established the first prong of the exception by maintaining regular visitation and contact with the children. However, substantial evidence supports the finding that maintaining their relationship would not be more beneficial to them than being adopted into a stable, permanent home. L.S. and the children shared affection and they had a strong bond, but the evidence showed their relationship was not entirely positive or parental in nature. L.S. visited the children each week and they showed a strong attachment to her, but she did not fill a parental role for them. During the many months of their dependencies, the children had spent only one hour each week with L.S. They played together and were affectionate but, during the visits, she had to be continually reminded of how to redirect problem behavior and to follow up with her directions to them. The children did not usually seek comfort from L.S. during visits. They had begun to form strong attachments with their caretakers, who provided daily care and support. There was strong evidence they desperately needed permanency and stability, and their anxieties and fears had already lessened in the secure environment of their foster home. L.S. did not show that her relationship with the children was of more benefit to them than the benefits of adoption. Substantial evidence supports the court's finding.

V. Designation of the Foster Parents as the Prospective Adoptive Parents

L.S. contends the court erred by designating the children's current foster parents as their prospective adoptive parents under section 366.26, subdivision (n)(1). L.S. is correct that the foster parents had not yet cared for the children for six months as required by the statute to qualify as prospective adoptive parents. However, this error was

harmless because six months have now passed, and L.S. has not shown any prejudice requiring reversal.

DISPOSITION

The judgments are affirmed.

McDONALD, J.

WE CONCUR:

HALLER, Acting P. J.

McINTYRE, J.